STATE OF MICHIGAN

COURT OF APPEALS

In re FORGETTE/ANTCLIFF-FORGETTE, Minors.

UNPUBLISHED
December 10, 2015

No. 327620
Genessee Circuit Court
Family Division
LC No. 07-123112-NA

Before: MURRAY, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Respondent-mother appeals as of right the trial court order terminating her parental rights to two minor children, MF and JAF, under MCL 712A.19b(3)(g) (failure to provide proper care and custody).[1] We vacate the trial court's order terminating respondent's parental rights and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2007, child protective proceedings were initiated against respondent. Ultimately, a supplemental petition was filed requesting termination of respondent's parental rights with regard to MF and JAF in November 2010. Respondent's parental rights were never terminated, however, because the children were placed in a guardianship with respondent's mother. While the guardianship was in place, the trial court's jurisdiction over the children was terminated.

In March 2015, while the children remained under the guardianship, respondent's mother passed away, and the children's maternal uncle and his wife began caring for them. On March 10, 2015, a petition was filed for removal of the children and termination of respondent's parental rights at the initial dispositional hearing. The petition alleged that respondent had neglected or refused to provide proper care and support, MCL 712A.2(b)(1), and that the home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of respondent, had become unfit for the children, MCL 712A.2(b)(2). In addition, the petition cited MCL 712A.19b(3)(b), (g), (j), and (k)(*iii*) as statutory grounds for termination.

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[1] The court also terminated the parental rights of the children's father, but he has not appealed that decision and, as a result, is not participating in this appeal.

With regard to respondent, the petition alleged, *inter alia*, that Child Protective Services ("CPS") had investigated numerous complaints between 2001 and 2010—which had resulted in petitions for the removal of the minor children and for the termination of respondent's parental rights—arising from respondent's "substance abuse, unstable housing and living conditions, medical neglect, physical abuse, domestic violence, and child endangerment." The petition also noted respondent's previous noncompliance with CPS- and court-recommended services, positive drug screens, multiple incidents of domestic violence, and three convictions of driving under the influence, which were related to incidents that occurred while the children were in the vehicle. The petition alleged that respondent initiated minimal contact with the children after April 20, 2010, and did not participate in foster care services. Additionally, the petition alleged that respondent had ongoing mental health issues, including bipolar disorder and adult ADHD, and substance abuse issues, including cocaine use, prescription drug abuse, and alcohol abuse.

On March 10, 2015, the trial court held a preliminary hearing, which respondent attended. Respondent denied all of the allegations in the petition, but she indicated that she supported the children's placement with their maternal uncle and that she was in favor of the uncle becoming guardian of the children. The trial court held, *inter alia*, that reasonable efforts for reunification shall not be made and authorized the petition, placing the children with Department of Health and Human Services ("DHHS") for care and supervision. The court subsequently came back on the record to consider respondent's request for parenting time. During the discussion, respondent personally stated that she had last seen the children on March 1, 2015, and that she had been at the school and involved in individualized education programs ("IEPs") for her son. The trial court ultimately ordered supervised parenting time for respondent for one hour per week.

On March 31, 2015, the trial court entered an order for adjournment,[2] which states that "the attorneys of record stipulated and moved for an adjournment of" the pretrial hearing previously scheduled for March 31. The order then states that the trial is adjourned to April 29, 2015. A proof of service in the record indicates that a copy of the order for adjournment was served on respondent's appointed counsel in court on March 31, 2015. Another proof of service in the lower court record indicates that the order for adjournment was served on respondent by ordinary mail, but the record also includes a copy of the order of adjournment stapled to an envelope addressed to respondent that was returned to the court as "not deliverable as addressed."

On April 29, 2015, the trial court held a hearing, which respondent did not attend. The prosecutor requested that the trial court hold a trial on the termination petition. The court inquired about the status of the guardianship proceedings, expressing its belief that this case would be resolved through guardianship. The prosecuting attorney stated that there was an issue with the guardian due to alleged criminal activity, and he did not believe that a guardianship was possible. The trial court scheduled the trial for May 5, 2015, and entered an order stating that the trial was adjourned to May 5, 2015, in accordance with the stipulation of the attorneys of record.

[2] The lower court record received on appeal does not include a transcript from this date.

The reasons stated for the adjournment were that the "parents failed to appear for trial date, and due to scheduling issues, this matter is adjourned." The proof of service in the lower court record indicates that respondent's attorney was served with the order of adjournment in court on April 29, 2015. There is nothing in the record indicating that notice was provided to respondent.

On May 5, 2015, the trial court adjourned the trial and scheduled the termination hearing for May 12, 2015. The only proof of service in the record indicates that the order of adjournment was served on the assistant prosecuting attorney, the children's lawyer-guardian ad litem, and the DHHS caseworker.

On May 12, 2015, the trial court held a trial on the petition, which requested jurisdiction over the children and termination of respondent's parental rights. Respondent was not present, and there was no discussion on the record regarding whether respondent was notified of the hearing on May 12, 2015, or the prior hearings. A foster care specialist with DHHS, who began working on the case in late March 2015, was the only witness, and she testified that she had not attempted to contact either parent since she began working on the case. Additionally, although her testimony was unclear, she also indicated that CPS had attempted to contact respondent and spoken with respondent by phone before the termination hearing was scheduled, but respondent's whereabouts were unknown at the time of the hearing. She stated that it was her understanding that the children had not been placed with the parents in "[q]uite a few years" and confirmed that the children were currently in an unlicensed foster care placement with their uncle. Additionally, she testified that the "family ha[d] a prior neglect history," and that the children were previously in the foster care system.

The trial court ruled as follows:

> The testimony is that neither parent has been in these children's lives - and the phrase was quite a few years. They've just been gone. And testimony is, is that although Ms. Storms has only been on the case for - since, I think, March - that there have been previous attempts to contact the parents, and their whereabouts are unknown.
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> Now, up until March 15th, you know, the parents had a right to rely on the fact that the children were in a guardianship and basically that would relieve them of their obligation for the care and custody of their children.
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> But there was no - then when the guardian passed away on March 15th, and here [sic] was no successor guardian appointed, the children are without anybody to take care of them.
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> So, I think that testimony satisfies jurisdiction 712A2(b)(1) [sic] and (2), failure to provide care and custody of the child – or children. So, that satisfies jurisdictional requirements.
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> And then with regard to termination of parental rights, there has to be at least one statutory basis for termination. And I think that subsection - this would be 712A19(b), subjection [sic] (g) - does apply: the parent without - strike that - the parent without regard to intent fails to provide proper care or custody for the

children and there is no reasonable expectation that the parent will be able to provide care and custody within any reasonable time, considering the children's age. Let's see, Matthew is 8 and Jordan is 6. And there's nobody that is available to take care of them. Obviously, they need[ed] to be taken care of since March 15th. There's no reasonable expectation that the parents will surface. Again, it's - the testimony has been that it's been quite a few years since the parents have even been in the picture. So, that testimony convinces the Court that there is no reasonable expectation that the parents will be able to take care of their children or step up to do that.

So, that's by clear and convincing evidence. So, there is that statutory basis to terminate rights. And, so, the Court looks to best interest under subsection 5. The Court does feel it is in the children's best interest for termination rights [sic] so that they can establish permanence and stability. That is the number one priority.

And there's no - because the children haven't seen their parents in several years, that there's no bond that would be of concern at this point. So, it is in their best interest for termination.

So, the Court will, based on those findings, terminate the rights of both Matthew and Jordan.

The trial court subsequently entered orders consistent with its findings on the record.

II. NOTICE OF HEARING

Respondent argues that she is entitled to a new hearing on the termination of her parental rights because she was not provided written notice 14 days prior to the hearing. We agree.

A. STANDARD OF REVIEW

Because respondent failed to raise this issue in the trial court, it is not preserved for appeal. *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996). We review unpreserved issues for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). To demonstrate such an error, a respondent must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the respondent's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "When plain error has occurred, [r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant *or* when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *In re Utrera*, 281 Mich App at 9 (quotation marks and citation omitted; alterations in original).

B. ANALYSIS

On appeal, respondent asserts that two due process violations occurred in this case, *i.e.*, she received insufficient notice of the May 5, 2015 termination hearing, which was adjourned, and she received insufficient notice of the May 12, 2015 termination hearing. Contrary to respondent's presentation of the record, the documents in the lower court record and the register of actions in this case indicates that a combined trial and dispositional hearing on the termination of respondent's parental rights was initially scheduled for April 29, 2015, adjourned to May 5, 2015, and then adjourned again to May 12, 2015. As such, the relevant focus in this case is the initial trial date of April 29, 2015. When a termination hearing is adjourned, service on a respondent's attorney is sufficient, and notice of the adjourned hearing need not be served on the respondent. See MCR 3.920(G); *In re BAD*, 264 Mich App 66, 70 n 2; 690 NW2d 287 (2004) (citing an older version of the court rule).

Respondents in termination proceedings have a right to procedural due process, which includes an opportunity to be heard and notice of that opportunity. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009). In Michigan, a series of statutes and court rules dictate the notice required for termination hearings. "[S]tatutes requiring notice to parents must be strictly construed . . . ." *In re Atkins*, 237 Mich App 249, 251; 602 NW2d 594 (1999).

MCL 712A.19b(2) provides, in relevant part:

> (2) Not less than 14 days before a hearing to determine if the parental rights to a child should be terminated, written notice of the hearing shall be served upon all of the following:
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> * * *
>
> (c) The child's parents.
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> * * *
>
> (g) The child's attorney and each party's attorney.

MCR 3.977(C)(1), which also pertains to the termination of parental rights, states that "[n]otice must be given as provided in MCR 3.920 and MCR 3.921(B)(3)." MCR 3.920(D)(3) provides that "[n]otice of a hearing on a petition requesting termination of parental rights in a child protective proceeding must be given in writing at least 14 days before the hearing." Similarly, MCR 3.921(B)(3) provides, in relevant part, "Written notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in subrule (B)(2) . . . ." The parent of a child and the attorney for the parent are parties entitled to notice under MCR 3.921(B)(2), unless parental rights have been terminated. Furthermore, a respondent must be served with a summons at least 14 days before a termination hearing. MCR 3.920(B)(2)(b); MCR 3.920(B)(5)(a)(*i*). MCR 3.920(G) and (H) include two potential exceptions to the notice requirement:

> **(G) Subsequent Notices.** After a party's first appearance before the court, subsequent notice of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party as provided in

subrule (D), except that a summons must be served for trial or termination hearing as provided in subrule (B).

(H) Notice Defects. The appearance and participation of a party at a hearing is a waiver by that party of defects in service with respect to that hearing unless objections regarding the specific defect are placed on the record. If a party appears or participates without an attorney, the court shall advise the party that the appearance and participation waives notice defects and of the party's right to seek an attorney.

Based on the record received on appeal, respondent was notified in the trial court on March 10, 2015, that the next *pretrial* hearing would be held on March 31, 2015. Additionally, on March 10, 2015, respondent signed a proof of service acknowledging that she was served with a summons to appear on March 31, 2015. On the summons, a box was checked to indicate that "[t]he purpose of the hearing is: to decide, **at a trial** whether one or more of the statutory grounds alleged in the petition are true." Notably, the next box, which would have indicated that the purpose of the hearing was "to rule on a request that your parental rights over the child(ren) be terminated," was not checked. Thus, consistent with the unequivocal statements on the record at the March 10, 2015 hearing, and the register of actions in this case, there is no indication that the March 31, 2015 hearing was intended to be a hearing during which the trial court would determine whether to terminate respondent's parental rights. As such, the summons to appear on March 31, 2015 did not fulfill the requisite 14-day notice of a termination hearing. See MCL 712A.19b(2), MCR 3.920, MCR 3.921(B)(3), and MCR 3.977. Given the lack of initial notice, the rule that personal service of notice of an adjourned termination hearing on a respondent is not required, and that service on the respondent's attorney is sufficient, was not implicated. See MCR 3.920(G); *In re BAD*, 264 Mich App at 70 n 2.

Apart from the March 31, 2015 order of adjournment that was mailed to respondent but returned to the court as "not deliverable as addressed," the record is bereft of any evidence that respondent received notice of the hearings on April 29, 2015, May 5, 2015, or May 12, 2015. Most significantly, there is no indication that respondent was personally served with a summons 14 days before the termination hearing, as required under MCR 3.920(B)(2)(b), (B)(4), and (B)(5)(a)(*i*). Moreover, there is no indication that the court or petitioner made any attempts to locate respondent's correct address or personally serve respondent after the order of adjournment was returned to the court as undeliverable.[3]

Although it is apparent that respondent's attorney received notice of the termination hearing, the notice served on respondent's attorney was not sufficient to provide notice to respondent under MCR 3.920(G) because respondent was still entitled to receive a summons for a trial or termination hearing as provided under MCR 3.920(B). Additionally, based on the plain language of the court rule, the waiver provision under MCR 3.920(H) was not triggered in this

[3] Rather, the DHHS caseworker testified that she made no attempts to contact respondent after she began working on the case in March 2015, and she was only aware of CPS contacting respondent by phone *before* the termination hearing on May 12, 2015, was scheduled.

case because respondent was not present at the termination hearing.[4] Accordingly, because the record provides no basis for concluding that respondent was served with a summons or received written notice 14 days before the termination hearing, a plain error occurred. See *Carines*, 460 Mich at 763.

Additionally, the record shows that this error affected the outcome of the proceedings and, therefore, affected respondent's substantial rights. *Carines*, 460 Mich at 763. Respondent argues that if she had received the requisite notice of the termination proceedings, she would have been informed that a guardianship with her brother was no longer a possibility, and she would have provided testimony that contradicted the testimony provided by the DHHS caseworker regarding her involvement with the children. As respondent asserts on appeal, it does appear that respondent would have provided contradictory testimony—or, at a minimum, further clarified her role in the children's lives while the guardianship was in place—in light of her statements regarding her involvement with the children on the record at the March 10, 2015 hearing. Thus, as in *In re Rood*, 483 Mich at 114-115, the failure to provide adequate "notice directly affected respondent's substantial rights because [her] lack of participation in the earlier proceedings . . . prevented the court from meaningfully considering whether respondent could become capable of caring for [her] child within a reasonable time. . . . Full notice . . . would have allowed [DHHS] and the court to gather other facts necessary to the court's termination decision."

Further, in light of the trial court's findings, i.e., that termination was proper because respondent had not seen the children in several years, it does appear that this testimony would have affected the outcome of the proceedings. Finally, in light of the caseworker's limited and vague testimony at the termination hearing, and the lack of the evidence in the record regarding respondent's involvement with the children before and after their guardian's death, the "error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," especially given that no other effort was made to investigate or present any evidence regarding respondent's condition or relationship with the children after the guardianship was established. See *In re*

[4] "When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004) (footnotes omitted). The first sentence of MCR 3.920(H) provides, "The appearance and participation of a party at a hearing is a waiver by that party of defects in service with respect to that hearing unless objections regarding the specific defect are placed on the record." Initially, it may appear that the presence of a respondent's attorney at a hearing is equivalent to the presence of the respondent for purposes of MCR 3.920(H). However, the second sentence still uses the word "party" but applies to situations when "a party appears or participates *without an attorney*." MCR 3.920(H) (emphasis added). The same use of the word "party" in the second sentence with the qualification "without an attorney" indicates that a respondent must actually appear herself in order to waive a notice defect pursuant to MCR 3.920(H). Such a waiver did not occur in this case.

Utrera, 281 Mich App at 9 (quotation marks and citation omitted; alterations in original). Thus, we vacate the trial court's order terminating respondent's parental rights and remand for a new termination hearing.

III. ADDITIONAL ISSUES RAISED ON APPEAL

Given our conclusion that remand is required for a new termination hearing, it is not necessary for us to consider the other issues raised by respondent on appeal. Nevertheless, we will briefly consider each of her claims in order to provide guidance to the trial court.

First, in considering MCL 712A.19a(2) in conjunction with MCR 3.976(B), see *In re Rood*, 483 Mich at 99, we reject respondent's claim that the trial court was required to hold a permanency planning hearing before it ordered termination of respondent's parental rights at the initial dispositional hearing. Based on the language of the statute and court rule, a permanency planning hearing is only required within 28 days after the trial court determines, *based on the presence of aggravating circumstances*, that reasonable efforts for reunification are not required. No aggravating circumstances were present here, and the trial court did not conclude that reasonable efforts were not required based on the presence of such circumstances.

We also reject respondent's argument that termination was improper at the initial dispositional hearing solely on the basis that none of the aggravated circumstances under MCL 712A.19a(2) were present in this case. MCR 3.977(E) permits termination at the initial termination hearing in the absence of aggravating circumstances.

However, we conclude that termination may have been improper at the initial dispositional hearing under MCR 3.977(E)(3) and (4). The trial court's finding that a statutory basis for termination existed under MCL 712A.19b(3) may not have been supported by clear and convincing evidence. See *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). Additionally, a preponderance of the evidence in the whole record may not have supported the trial court's finding that termination was in the best interests of the children. See MCL 712A.19b(5); *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). The trial court's findings were predicated only on the undetailed and vague testimony of the DHHS caseworker, which was solely based on her review of the file and provided no insight regarding respondent's current ability to care for the children, the circumstances of the guardianship, respondent's progress or lack of progress during the guardianship, and respondent's interest in caring for the children in the future or wishes regarding the children's placement.

Moreover, the trial court's finding that the children had not seen respondent in several years, and its related inference that there is "no bond that would be of concern," may not have been supported by the record, as the caseworker only testified that the children had not been *placed* with respondent in several years—she provided no testimony regarding whether respondent had any contact with the children. As discussed *supra*, there was evidence in the record that respondent had seen the children recently, see MCR 3.973(E)(1), (2); MCR 3.977(H)(2); *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); *In re AMAC,* 269 Mich App 533, 537; 711 NW2d 426 (2006), and no evidence was provided regarding whether respondent had seen the children during any of the parenting time visits that were ordered following the preliminary hearing. The trial court also failed to consider the children's

placement with a relative at the time of the termination hearing. See *In re Olive/Metts Minors*, 297 Mich App 35, 43; 823 NW2d 144 (2012). Thus, we conclude that there may have been insufficient evidence in the record to determine whether termination of respondent's parental rights was proper.

On remand, in addition to ensuring that respondent receives the requisite notice of the termination hearing, we instruct the trial court to take additional evidence and make additional findings regarding whether a statutory basis for termination exists and whether termination of respondent's parental rights is in the best interests of the children. See MCR 7.216(A)(5), (6).

IV. CONCLUSION

The lack of notice in this case constitutes a plain error affecting respondent's substantial rights. As such, respondent is entitled to a new termination hearing, before which respondent must receive the requisite notice. On remand, we instruct the trial court to take additional evidence and determine, pursuant to MCL 712A.19b(3), whether a statutory basis for termination has been established by *clear and convincing* evidence, *In re Moss*, 301 Mich App at 80, and whether termination of respondent's parental rights is in the best interests of the children based on a preponderance of the evidence in the whole record, *In re White*, 303 Mich App at 713. See also MCR 3.977(E).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Michael J. Riordan